NTSB Order No.
EM-156

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D. C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D. C.
on the 1st day of November, 1989

PAUL A. YOST, Commandant, United States Coast Guard,

v.

GEORGE FRANCIS BLAKE, Appellant.

Docket ME-135

OPINION AND ORDER

Appellant seeks review of a decision of the Commandant (Appeal No. 2476, dated November 30, 1988) affirming an order entered by Administrative Law Judge Jerry W. Mitchell on December 16, 1987 following an evidentiary hearing.[1] By that order the law judge revoked appellant's merchant mariner's document (No 559-62-5715-D3) on finding proved a charge of misconduct based on his alleged wrongful possession of marijuana under the authority of his document as an able bodied seaman aboard the G/T CHEVRON OREGON. For the reasons that follow, we will deny the appeal.[2]

The facts leading to the charge against appellant, who advanced no evidence in his defense, are fully set forth in the Coast Guard's decisions and need not be repeated at length here. Briefly stated. a search of appellant's room on the OREGON shortly before the ship on December 26, 1987 was to set sail from an offshore facility near El Segundo, California, produced what the master believed was a small quantity of marijuana, a substance the master suspected, for reasons thoroughly developed at the hearing, appellant may have been smoking just prior to his arrival on the ship's bridge to take the helm.[3] Appellant was discharged from the

[1]Copies of the decisions of the Commandant and the law judge are attached.

[2]The Coast Guard has filed a reply brief opposing the appeal.

[3]The master, accompanied by the chief mate, found in appellant's desk what appeared to be half of a partially smoked marijuana cigarette and a so-called "bud" of marijuana roughly the

vessel, the seized substance, which later tested positive for marijuana, was subsequently turned over to the Coast Guard, and his proceeding was eventually initiated.

All of the arguments raised by the appellant here have been considered and rejected by the law judge and the Commandant, and we are not persuaded that the has established any valid ground for differing with their rulings. Specifically, we find no error in the Coast Guard's judgment to the effect that the Fourth Amendment's prohibition against unreasonable searches did not bar its use in an administrative hearing of evidence obtained by an employee (i.e. the master) of the company operating the OREGON; that any right the appellant might have in a criminal contest to confront his accuser was not implicated by the taking of a witness' testimony by telephone at the hearing in this proceeding; that the chain-of custody for the evidence seized in appellant's quarters was not defective because the master prepared no written description of the substance he personally placed in an envelope and subsequently observed the removal of for testing (by the individual who later testified by telephone at the hearing); and that, despite the small quantity of marijuana appellant was found to have in his possession, the proper exercise of discretion in this case did not dictate a sanction less than revocation.[4] As to this last point, however, we think some additional comment is warranted.

Appellant's contention to the effect that the Board should overturn the Commandant's alleged refusal to exercise his statutory discretion to consider a sanction less than revocation rests in large part on a line of Board cases in which we noted our judgment that, contrary to the Commandant's interpretation, the statute at issue in those cases did permit lesser sanctions. See, e.g., Commandant v. Fifer, NTSB Order EM-111 (1984). Appellant's

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size of a dime.

[4]We are also of the view that even if appellant's confrontation or chain-of custody arguments had merit, the outcome of the case would have been no different, for the uncontradicted live testimony of the master and chief mate is that the appellant, once questioned by the master as to his awareness of the company policy against marijuana aboard ship, admitted to having some of the drug on board. Evidence of that admission would be sufficient to sustain the charge of misconduct, we think, without regard to the admissibility or reliability of the evidence the Coast Guard adduced in an effort to show that the seized substance was in fact marijuana.

reliance on such precedent is misplaced on at least two grounds. First, those cases construed a statute (46 U.S.C. §239b) that has been recodified (in 46 U.S.C. §7704) in a manner that, we have ruled, eliminated the discretion we believed the Commandant formerly possessed. See Commandant v. Cain, NTSB Order EM-125 (1985). Second, those cases, and the statute they applied, dealt not with the Commandant's powers under 46 U.S.C. §7703 to sanction a merchant mariner for misconduct related to narcotic drugs that had occurred while the seaman was acting within the scope of his license or document, but with the Commandant's authority to take such action against seaman who have been convicted in court of drug offenses that occurred when they were not serving under their licenses or documents.

Given the congressional intention to make revocation mandatory whenever a seaman has been convicted of a drug offense, no matter how serious and without regard to its nexus to his maritime activities,[5] the appellant faces a heavy burden in arguing that the Commandant has not properly exercised his discretion in affirming revocation for drug-related misconduct directly implicating safety at sea. In that regard, the Commandant made a qualitative judgment, informed by consideration of the specific facts of this case, concerning the risks that appellant's possession of marijuana aboard the CHEVRON OREGON entailed:

> "I do not consider the sanction of revocation as excessive or inhumane when one considers the significant loss of life or property that can occur as a result of drug use by crewmembers aboard merchant vessels. Appellant made a conscious decision to wrongfully bring a dangerous drug on board his ship, even though he admittedly knew the explicit company prohibition against such action.... The sanction of revocation is reasonably and realistically proportionate to the potential dangers inherent in the misconduct."[6]
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> Decision at 9.

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[5]In Cain, supra, we took note of the fact that Congress had mandated revocation notwithstanding its knowledge "that there would be a wide disparity in the seriousness of the drug law violations involved in the various state and federal convictions that could provide the basis for a proceeding under section 7704..." (id.at 5-6).

[6]The Commandant could reasonably conclude, inferentially, that appellant intended to use the drug in his possession, wholly apart from the strong circumstantial evidence that he had been using it shortly before he reported for duty.

We do not believe that the Commandant's reasoning as to sanction is undermined by the fact that respondent was not shown to have possessed a large amount of marijuana. Even a single instance of drug use aboard ship could lead to the very harm the Commandant's decision seeks to preclude. Nor do we believe that Commandant's decision can fairly be said to reflect an improper refusal to exercise his discretion to determine whether a sanction less than revocation was warranted. Rather, it simply reflects a judgment, with which appellant disagrees, that revocation was appropriate. We find no error or abuse of discretion.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal is denied, and

2. The Commandant's decision affirming the revocation by the law judge of appellant's seaman document is affirmed.

KOLSTAD, Acting Chairman, BURNETT, LAUBER, NALL and DICKINSON, Members of the Board, concurred in the above opinion and order.